UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
RANDALL EDWARD AULER,	)	CASE NO. 03-36908 HCD
a/k/a RANDALL E. AULER,	)	CHAPTER 13
	)	
DEBTOR.	)	
	)	
	)	
MEMBERS ADVANTAGE CREDIT UNION,	)	
	)	
PLAINTIFF/COUNTER-DEFENDANT,	)	
	)	
vs.	)	PROC. NO. 04-3036
	)	
RANDALL EDWARD AULER,	)	
	)	
DEFENDANT/COUNTER-CLAIMANT	)	

Appearances:

Christopher L. Willoughby, Esq., attorney for plaintiff, Braje & Nelson, LLP, 126 West Fourth Street, Post Office Box 1006, Michigan City, Indiana 46361-8206; and

Lyn Leone, Esq., attorney for defendant, Post Office Box 1028, Notre Dame, Indiana 46556.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 3, 2004.

Before the court are two motions filed by Lyn Leone, Esq., attorney for the debtor Randall Edward Auler: "Motion to Vacate July 21, 2004 Order Granting Plaintiff's Complaint, Denying Defendant's Counterclaim to Hold Creditor in Contempt of Automatic Stay, and Denial of Counsel's Participation in Telephonic Conferences," and "Motion for Hearing on Motion to Vacate." For the reasons that follow, the court denies both motions.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On July 21, 2004, the court held a telephonic pre-trial conference on the dischargeability complaint filed by the creditor Members Advantage Credit Union ("plaintiff" or "MACU"), and the counterclaim of the debtor Randall Edward Auler ("defendant" or "debtor"). In its Order of July 21, 2004, the court noted that, for the second time in this proceeding, counsel for the defendant could not be reached for the scheduled telephonic pre-trial conference. The first conference, held May 12, 2004, was continued due to counsel's unavailability. The second, held July 21, 2004, was not continued, however. After the court repeatedly telephoned defendant's counsel and found the line engaged (just as it had been at the time of the earlier pre-trial conference), it conducted the conference with plaintiff's counsel alone. The court granted the plaintiff's complaint and denied the defendant's counterclaim. It also required Lyn Leone, Esq., to appear in person for all future pre-trial conferences. *See* R. 17.

On August 4, 2004, counsel for the defendant filed a motion to vacate the court's Order of July 21, 2004. The attorney stated that she had been available for the first pre-trial conference but that something apparently "thwarted Debtor's Counsel from being contacted by telephone":

> Regarding the May 12, 2004 pre-trial conference, which [sic] the record indicates that Debtor's Counsel was unavailable though indeed Debtor's Counsel was available but was not connected to such telephone conference.

R. 19 at 2. The defendant's counsel reported that, after unsuccessful settlement negotiations, the defendant ultimately offered to abandon the secured property to the plaintiff. According to the defendant's attorney, the plaintiff's counsel agreed "that they would not pursue the matters further and that he would explain that to the Judge." *Id.* at 6. As a result, the defendant's counsel believed that plaintiff's counsel would advise the court that there was no need for another court conference. She stated in her motion:

> As a result of all of the above, Debtor's Counsel believed there would be no telephonic conference and that [counsel for plaintiff] was going to take care of notifying the Judge.
>
> Based upon this misconception, Debtor's Counsel did not report into [sic] the Court as already established with Judge Dee's [sic] secretary.

Id. Counsel for the defendant said that she "experienced a misguided reliance upon opposing Counsel's representations during settlement negotiations." *Id.* at 7. She asked the court to reconsider its Order.

In the plaintiff's Response to Motion to Vacate, counsel for the plaintiff agreed that the parties had held settlement discussions; he noted that, at the pre-trial conference, he advised the court of the negotiations. However, in the view of plaintiff's counsel, the settlement had not been resolved at the time of the conference. The plaintiff's attorney asserted that he never told defendant's counsel that he would notify the judge of anything. He insisted that he had no authority to relieve defendant's counsel of her duty and obligation to participate in the pre-trial conference. He further stated:

> Defendant's/Counter-Plaintiff's counsel has not only grossly misstated material facts and circumstances surrounding her failure to participate in the conference but also inappropriately maligned [the plaintiff] and its counsel.

R. 22 at 2. The defendant's counsel thereupon requested a hearing to respond to those allegations.

Discussion

Because the defendant's motion to vacate was filed more than ten days after entry of the court's order, the court treats it as a motion for relief from the order under Rule 60(b) of the Federal Rules of Civil

Procedure.[1] *See Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000); *Helm v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995). Under that rule, made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024, "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for six listed reasons.

The defendant's counsel made no reference to the rule or its enumerated subsections as grounds for the motion to vacate. Instead, she explained that she failed to appear telephonically at the pre-trial conference because she had misguidedly relied on the representation of plaintiff's counsel that he would "take care of notifying the judge" that "there would be no telephonic conference." R. 19 at 6, 7. The court finds that her claim of misguided reliance could be characterized as a request for relief because of "excusable neglect" under Rule 60(b)(1) or for "any other reason justifying relief" under Rule 60(b)(6). *See* Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b)(1), (6). The defendant, who moved to vacate the court's Order of July 21, 2004, has the burden of proving that excusable neglect exists or that relief from the Order is otherwise justified under Rule 60(b). *See In re Hall*, 259 B.R. 680, 682 (Bankr. N.D. Ind. 2001).

The Supreme Court's "excusable neglect" definition in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993), is used in Rule 60(b) determinations.[2] *See Robb v. Norfolk & Western R. Co. (In re Robb)*, 122 F.3d 354, 359 (7th Cir. 1997). In

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[1] The defendant has not claimed that clerical mistakes were made. For that reason, Rule 60(a) is not applicable herein. The defendant's entitlement to relief must be proven under Rule 60(b).

[2] In *Pioneer*, the Supreme Court directed courts to use the ordinary, dictionary definition of "neglect," which was "'to give little attention or respect' to a matter, or, closer to the point for our purposes, 'to leave undone or unattended to *esp[ecially] through carelessness.*' Webster's *Ninth New Collegiate Dictionary* 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* at 388, 113 S. Ct. at 1494-95. The Court held that the determination of "excusable neglect" is

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

(continued...)

considering whether the defendant's attorney's claim of misguided reliance qualifies for relief, the court finds first that counsel's failure to attend the scheduled conference constituted "neglect" as it was defined in *Pioneer*. In the view of this court, the failure of defendant's counsel to appear at the pre-trial conference demonstrated a lack of attention or respect for the court's order requiring her attendance. In fact, she reported in her motion that, on the morning of the pre-trial conference, she "almost decided to 'check-in' with the Bankruptcy Court but talked herself out of it since she believed and trusted that Attorney Willoughby had kept his promise to advise the Court." R.19 at 6. Her assumption, without verification, that plaintiff's counsel had acted to cancel the hearing was careless, harmful to her client, and negligent. *See In re Robb*, 122 F.3d at 360 (concluding that counsel was negligent for failing to inform or seek the approval of the trial court after opposing counsel had agreed to extend a filing deadline)*; Sibson v. Midland Mtg. Co. (In re Sibson),* 235 B.R. 672, 676 (Bankr. M.D. Fla. 1999) (finding that counsel "may not be permitted to claim the benefits of excusable neglect for his failure to establish minimum safeguards for determining that action is being taken") (citing cases). "[A]ttorney negligence or oversight rarely warrants relief from judgment." *In re Kellogg*, 197 F.3d 1116, 1120 n.3 (11th Cir. 1999) (affirming bankruptcy ruling; rejecting debtor's claim that he should be excused from judgment because counsel led him to believe that the judge would not rule on the debtor's exemption at the hearing). Once neglect has been established, the court must determine if it qualifies for relief as "excusable neglect" under *Pioneer*.

The court finds that the failure of defendant's counsel to attend the pre-trial conference, or to verify its removal from the court's calendar, was not excusable. Her view that a party or attorney could "notify the judge" that there would be no conference is simply mistaken. The court directed the parties to appear before it for a conference. *See* Fed. R. Bankr. P. 7016; Fed. R. Civ. P. 16(a). "If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto

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[2](...continued)
Id. at 395, 113 S. Ct. at 1498.

as are just." Fed. R. Civ. P. 16(f). This court permits attorneys to make requests to continue, reschedule or remove a conference from the court's calendar, but the determination is made at all times by the court, not the parties, and is based on the "good cause" demonstration of the parties and the timing of the request. *See* N.D. Ind. L.B.R. B-5071-1 (stating that the granting of such requests is at the discretion of the court). Attorneys who fail to abide by these basic procedural rules face sanctions.

There is a second reason for determining that counsel's conduct was not excusable neglect. Counsel for the defendant mistakenly believed that her client's proffered abandonment of the secured chattel to the plaintiff would resolve the issues before the court in this adversary proceeding. However, the plaintiff's complaint, based upon 11 U.S.C. § 523(a)(2)(A) and (B), claimed that the defendant's loan applications, loan agreement and disclosure statements contained fraudulent misrepresentations and that the defendant obtained the loans by using false pretenses, false representations and/or actual fraud. The issue of the dischargeability of those loans still was before the court. Nothing in the defendant's motion indicates that counsel for the defendant had any justification for her "good faith belief [that] matters were resolved." R. 19 at 7.

The court finds, under the specific facts and circumstances before it, that counsel for the defendant was not prevented from attending the pre-trial conference by an act of God or by a circumstance beyond her control. *See Pioneer*, 507 U.S. at 394,113 S. Ct at 1498. Although she was not acting in bad faith, counsel failed to appear at the time of the pre-trial conference and failed to verify that the conference had been removed or to seek the court's approval of her absence. The attorney herself admitted that her choice not to "check in with the court" was misguided. The court finds that counsel's nonappearance does not qualify as "excusable neglect" under Rule 60(b)(1) or as an "exceptional circumstance" under Rule 60(b)(6). *See In re Williams*, 277 B.R. 78, 81 (Bankr. D. Md. 2002) ("To prevail upon a motion for reconsideration under Rule 60(b)(6), the moving party must prove exceptional circumstances"). Although counsel notified the court that she had filed numerous documents "in an expeditious, conscientious and timely manner," R. 19 at 2, at each pre-trial conference she could not be reached at the scheduled time because her telephone was busy. *See Robb*, 122 F.3d at 362

(permitting a court to consider an attorney's record of compliance with court deadlines as one factor that has a bearing on whether the negligence of the attorney "constitutes 'excusable neglect'"). The court has kept in mind "the standards expected of all attorneys as well as the importance of preserving the integrity of filing deadlines and court rules." *Id.* at 363. It finds that the attorney did not perform her responsibility to the court and to her client with vigilance and caution. *Id.* at 362. Taking into account all the relevant facts and circumstances concerning counsel's omission, as required under *Pioneer*, it determines that her conduct does not constitute excusable neglect or any other reason that would justify relief from the court's Order of July 21, 2004. It further finds that the defendant is "held accountable for the acts and omissions of their chosen counsel." *Id.* at 397, 113 S. Ct. at 1499.

Finally, the court considers the request by defendant's counsel for a hearing on this motion to vacate the court's order. A hearing is not required for a Rule 60(b) motion for reconsideration. *See United States v. 8136 S. Dobson St.*, 125 F.3d 1076, 1086 (7th Cir. 1997), *cert. denied*, 523 U.S. 1111 (1998). In light of the fact that the defendant failed to establish a basis for invoking Rule 60(b) and that the record reflects no error or need for evidentiary clarification that might affect the court's ruling, the court, in its discretion, denies the motion of defendant's counsel for a hearing on the Motion to Vacate.

Conclusion

Based upon a consideration of all the relevant facts and circumstances surrounding the failure of counsel for the defendant to attend the court's scheduled pre-trial hearing on July 21, 2004, the defendant's "Motion to Vacate July 21, 2004 Order Granting Plaintiff's Complaint, Denying Defendant's Counterclaim to Hold Creditor in Contempt of Automatic Stay, and Denial of Counsel's Participation in Telephonic Conferences" and "Motion for Hearing on Motion to Vacate" are DENIED.

SO ORDERED.

JSO1

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT